Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975

No. 75-235

G. M. LEASING CORP.,
Petitioners,

v.

UNITED STATES, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The Opinion of the Court of Appeals (App. to Petition pg. A-1) is reported at 514 F.2d 935.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on May 1, 1975. A timely petition for rehearing was filed pursuant to Rule 40, Federal Rules of Appellate Procedure, along with Suggestion for Rehearing En Banc on May 13, 1975. The

petition for rehearing was denied on June 17, 1975. Petition for Certiorari was filed on August 13, 1975 and granted December 15, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254.

QUESTION PRESENTED

Whether tax agents of the United States acted illegally in seizing automobiles and documents in violation of the petitioner G. M. Leasing Corporation's Fourth Amendment rights under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Code, Title 26 § 6321, 68A Stat. 779, Aug. 16, 1954, c. 736, provided as of the dates involved in this case:

Lien for Taxes

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

United States Code, Title 26 § 6331, 80 Stat. 1135, Nov. 2, 1966, P.L. 89-719, Title § 104(a), 68A Stat. 783, Aug. 16, 1954, c. 736, provided as of the dates involved in this case:

Levy and distraint

> (a) *Authority of Secretary or delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under Section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in Section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(*b*) *Seizure and sale of property.*—The term 'levy' as used in this title includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

United States Code, Title 26 § 6861, 68A Stat. 834, Aug. 16, 1954, c. 736, provided as of the dates involved in this case:

Jeopardy assessments of income, estate, and gift taxes.

(*a*) *Authority for Making.*—If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in Section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of Section 6213(a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof.

United States Code, Title 26 § 7426, P.L. 89-719, Title 1 § 110(a), Nov. 2, 1966, 80 Stat. 1142, provided as of the dates involved in this case:

Civil actions by persons other than taxpayers.

(*a*) *Actions permitted.*—

(1) *Wrongful levy.*—If a levy has been made

on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

STATEMENT

On March 19, 1973, the Internal Revenue Service made an assessment of income taxes, penalties, and interest against George I. Norman, Jr. and his wife, Frances M. Norman. Simultaneously, it was determined that the collection of taxes was in jeopardy. Mr. Norman had been a fugitive from justice for several weeks. Shortly thereafter, within two days, the Internal Revenue Service agents made the determination that petitioner G. M. Leasing Corporation was an alter ego, nominee, or transferee of George I. Norman, Jr.; whereupon, all of the assets and books and records of G. M. Leasing Corporation were seized without notice of any kind to petitioner nor an opportunity to be heard. Two automobiles which were titled in the name of G. M. Leasing Corporation were seized by the Internal Revenue Service and turned over to lien creditors who sold said automobiles. (App. p. 33). The remaining automobiles belonging to G. M. Leasing Corporation are still being stored by the Internal Revenue Service.

On May 31, 1973, petitioner G. M. Leasing Corporation, a Utah corporation, filed suit in the United States District Court of Utah, against the United States, Department of Treasury, Internal Revenue Service and the named individual officers, agents and employees of the United States Internal Revenue Service. The petitioner G. M. Leasing Corporation alleged that the individual named respondents as agents of the Internal Revenue Service entered premises in Salt Lake County, Utah, and illegally seized automobiles and documents of the petitioner G. M. Leasing Corporation. It was alleged that the seizure was in violation of the Fourth and Fifth Amendments to the Constitution of the United States. The petitioner G. M. Leasing Corporation sought a return of all documents seized by agents of the United States, the return of motor vehicles seized by the United States and a suppression of evidence obtained as a result of such seizure including destruction of all photostats of books, records, and files of G. M. Leasing Corporation. Petitioner also sought general and punitive damages against the individual defendants as the result of their illegal search and seizure and damages against United States of America for allowing the alleged wrongful sale of two motor vehicles.

An answer and counterclaim were filed by respondents, admitting the seizure, but denying the property seized was that of the petitioner G. M. Leasing Corporation. Instead the respondents claimed that the property belonged to George I. Norman, Jr. The answer alleged the jeopardy assessment for income taxes, penalties and interest made against George I. Norman, Jr.

The counterclaim alleged that the petitioner G. M. Leasing Corporation was the alter ego, nominee, or transferee of George I. Norman, Jr., and the Internal Revenue Service sought foreclosure on the automobiles seized.

During the pendency of the action assets were seized from George I. Norman, III, the son of George I. Norman, Jr. The Internal Revenue Service again claimed that George I. Norman, III, was an alter ego, nominee, or transferee of George I. Norman, Jr. The motion was allowed and George I. Norman, III filed his complaint in intervention alleging in essence the same matters as G. M. Leasing Corporation and also seeking similar relief.

Trial was had in the United States District Court for the District of Utah on May 10, 1974. The trial court found that the individual Internal Revenue Service agents had acted beyond the scope of their authority and had violated the Fourth Amendment to the Federal Constitution in searching the offices of G. M. Leasing Corporation and seizing its books and records. The trial court awarded compensatory damages against the individual agents in an amount to be thereafter determined. The trial court also found that one individual agent had acted with malice and the court awarded punitive damages against that agent. The court further ordered that the books and records which had been illegally seized be suppressed as evidence and that the photocopies of those books and records that had been made by the government should be destroyed. The

court found that G. M. Leasing Corporation and George I. Norman, III, were not the alter egos, nominees, or transferees of George I. Norman, Jr., and that their assets should be returned to them and that damages should be awarded against the United States of America for the value of two automobiles of G. M. Leasing Corporation that had been sold. The Government's counterclaim was dismissed with prejudice.

The Court of Appeals for the Tenth Circuit reversed the judgment of the District Court concluding that the seizure was valid under the provision of 26 U.S.C. § 6331(a). The Court did not reverse the trial court's order to return the property that had been seized from George I. Norman, III.

SUMMARY OF ARGUMENT

A corporation's records and automobiles are entitled to protection from unreasonable searches and seizures. Whether the seizure of petitioner's property was claimed for civil or criminal purposes the Fourth Amendment and Fifth Amendment provide standards by which the legality of the seizure is to be judged. The Fourth Amendment implies a preference for a warrant before private property can be searched or seized. Only exigent circumstances justify a departure from the warrant requirements and a determination by a neutral and detached magistrate that a seizure is justified.

Tax seizures are not immune from the requirements of the Fourth and Fifth Amendments and some determination of probable cause by an objective judgment should either be a prerequisite to or afforded immediately after the seizure of a corporation's property and records. Actions taken by government agents in violation of the Fourth Amendment give rise to a cause of action against the respondents for damages and affirmative injunctive relief. The conduct of the respondents in the instant case indicates that they acted in disregard of Fourth Amendment standards and without good faith.

ARGUMENT

POINT I

THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS UNREASONABLE SEIZURES CONDUCTED BY AGENTS OF THE UNITED STATES WITH A VIEW TOWARDS CIVIL OR CRIMINAL PROCEEDINGS IN ENFORCEMENT OF THE REVENUE LAWS.

The conduct of agents and employees of the Internal Revenue Service in seizing automobiles and records of G. M. Leasing Corporation was in violation of the Fourth Amendment to the Constitution of the United States because such conduct constituted an unreasonable seizure. G. M. Leasing Corporation in response to the action of tax agents of the United States brought suit against the United States for an alleged wrongful tax levy and seizure of assets of G. M. Leasing Corporation and sought return of property seized.

G. M. Leasing Corporation also sought damages against the individual named defendants for violation of its Fourth Amendment rights based on the search of its office and seizure of its records. Subsequent intervention was allowed by the trial court for George I. Norman, III whose property was also seized. The United States counterclaimed for foreclosure on the property seized. The District Court for the District of Utah entered judgment in favor of Petitioner G. M. Leasing Corporation ordering the return of seized assets, damages yet to be determined, the return of all books and records seized, the destruction of photostats that had been made of the records, and the prohibition of their use by the respondents. The Court of Appeals for the Tenth Circuit reversed the judgment in favor of G. M. Leasing 514 F.2d 935. In reference to the seizure of the assets of G. M. Leasing Corporation the Court of Appeals held that: ". . . [Respondents] conducted a statutorily valid seizure." 514 F.2d 941. The Court concluded 26 U.S.C. §6331 (a) and (b) was sufficient authority for the action of the respondents.

The facts pertinent to this inquiry disclose that G. M. Leasing Corporation was, at the time of respondents' seizure, a Utah corporation in good standing. (R. Vol. I 13 lines 10-15; Exhibit No. 1) G. M. Leasing Corporation was incorporated for the purpose of owning and leasing various expensive motor vehicles. (App. 51). G. M. Leasing Corporation had not actually begun leasing autos, because none of the cars they owned were in good enough shape. (App. 52). However, G. M. Leasing had undertaken many of the prerequisites for engaging in business. It had obtained lease forms.

(App. 53). It had contacted prospective lessees, (App. 53). It had initiated inquiries to obtain either a dealership or better purchase prices for the cars it acquired. (App. 53-54). There was evidence and conflicting evidence regarding other attributes of G. M. Leasing's separate corporate existence. There was conflicting evidence as to whether stock was issued. A stockholder testified that he had been issued stock (R. Vol. I, page 52, line 5-12; page 53, lines 17-18). However, an officer and director testified that no stock had been issued. (App. 43). While one officer and director testified that there were no meetings of the Board of Directors; (App. 43); another officer testified that meetings took place on a daily basis although they were not formally designated as directors' meetings. (App. 53-54). The trial court found that G. M. Leasing Corporation was not an alter ego, nominee, or transferee of George I. Norman, Jr. (R. Vol. 2, page 87, findings 22- page 88 findings 32). The Court of Appeals reversed.

On March 19, 1973, agents of the Internal Revenue Service made a jeopardy assessment of income tax due and owing the United States for the years 1970 and 1971 from George I. Norman, Jr., and Frances M. Norman. Neither of these persons are parties to this action. Subsequently, on March 22, 1973, respondents acting without a search warrant entered the garage and building at 4751-53 Holladay Boulevard in Salt Lake County, State of Utah. The premises were the offices of G. M. Leasing Corporation and the residence of George I. Norman, III as well as the office of George I. Norman, Jr. (App. 19, 32-33, 34-

35). The agents entered the premises by engaging locksmiths to open the locks without the permission of petitioner or any other person having an interest in the premises. (App. 19-20). The group manager of the Internal Revenue office in Salt Lake City, testified that it was not a common practice to use a warrant or summons under such circumstances (App. 19). A lock was removed by the locksmiths in order for the respondents to gain entrance (App. 20). The removal of the lock was apparently done at the request of respondents Haacke and White, agents of the Internal Revenue Service (App. 20-21). Subsequent to entry on the premises by some of the respondents, George I. Norman III arrived (App. 24) and a determination was made by the agents that there may be a possible violation of constitutional rights by seizing any property and the premises were locked by restoring the original locks (App. 24). Two days later, respondents made a decision again to enter the premises. They acted without notice of any kind to G. M. Leasing Corporation, and upon the conclusion that G. M. Leasing Corporation was an alter ego, nominee, or transferee of George I. Norman, Jr. They then searched the premises and seized books and records of G. M. Leasing Corporation. (App. 22-24). All assets of G. M. Leasing Corporation including seven automobiles and a bank account were seized as was certain stock, later determined to be that of George I. Norman, III. The seizure of the automobiles and records was made with the aid of investigating officers of the Intelligence Division of the Internal Revenue Service. While the special agents were present, a commercial storage van was used to haul away the Corporation's records (App.

28-29). The agents had been told by Internal Revenue Service lawyers to seize property including books and records but not to look at them and to seal them. They were apparently opened and photocopied some time later. (App. 27-30). Photostats of some of the records were apparently turned over to the FBI for their investigative purposes. (Supplemental Memorandum of Appellants Tenth Circuit p. 2). At the time of the second seizure, agents of the I.R.S. told intervenor he would have to move and find a new home. (App. 34-35). Intervenor moved to his family's residence and the next day IR[illegible] agents raided that premises also. (App. 35). While there, agents threatened to throw George I. Norman, III in jail, seize his family's house and even if he didn't allow them to make an inventory of the home and premises they were going to do it anyway. (App. 35).

Based on the above, the trial court found that the respondents "did intentionally commit forced entry, search and seizure knowing full well that they were violating the rights of G. M. Leasing Corporation and Intervenor . . ." (R. Vol. 2, 86 para. 8).

It is submitted that the actions of the respondents were in violation of the Fourth Amendment of the Constitution of the United States. The broad powers of search and seizure known at common law were often used in enforcement of the revenue laws. However, revenue enforcement was not free from some restriction. In Landynski, *Search and Seizure and the Supreme Court*, p. 25, it is observed:

It was through efforts to control abusive enforcement of tax laws that limits were first placed on search and seizure. At the urging of the new king, William of Orange, one tax was abolished by Parliament specifically on the ground that the searches required in its enforcement constituted 'a badge of slavery upon the whole people exposing every man's house to be entered into and searched by persons unknown to him.' In 1733 a tobacco and wine tax proposed by Walpole failed of parliamentary enactment because of its search provisions, though under its terms only warehouses would have been subject to search on a general warrant; a special warrant would have been required for the search of dwellings. And in 1763 William Pitt proclaimed against the cider tax and its enforcement provisions. In the words which have rung out through the centuries, he cried: 'The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it —the storm may enter—the rain may enter—but the King of England cannot enter; all his force dares not cross the threshold of that ruined tenement.'

The general warrants and writs of assistance in prevalent use by the English Crown were well known to the founders of the American Constitution. The case of *Entick v. Carrington*, 19 Howell State Trials 1029 (1765) where papers of a publisher were seized, and a private action for their return was upheld where the seizure was excessive, was apparently well known to colonial leaders. Writs of assistance to collect various customs and taxes were frequently used in the American colonies. In Massachusetts, the governor of the colony would often issue writs of assistance in aid of customs

officers. The objections to the practice were substantial which led the governor to advise officers to apply for writs in the Superior Court. Landynski, *supra*, p. 32. Also, in Massachusetts, the Declaration of Rights adopted in 1780 expressly prohibited unreasonable searches and the substance of its provisions adopted in other colonies. Landynski, *supra*, p. 38.

With reference to the Fourth Amendment and its relation to the history of use of general warrants it has been observed:

> In recognition of this national criticism, President Washington in his first inaugural address urged modification in the Constitution to safeguard 'the characteristic rights of freemen' but refused to make 'particular recommendations.' James Madison, a leading light in the Convention, as in the struggle for ratification, committed his great prestige to the fight for a bill of rights and assumed the role of sponsor in pushing the amendments through Congress. He specifically adverted to the need for search safeguards in the light of the necessary and proper clause: 'The General Government has a right to pass all laws which shall be necessary to collect its revenue: the means for enforcing the collection are within the discretion of the Legislature: may not general warrants be considered necessary for this purpose . . .?' Madison's solution to the problem was a clause to read as follows: 'The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly

describing the places to be searched, or the persons or things to be seized.'

Madison's draft proposal for a bill of rights was referred to committee, where the search provision was altered to read: 'The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.' Landynski, *supra*, p. 41.

It is submitted that the history of the Fourth Amendment supports a conclusion that it was intended to restrict seizures made in aid of revenue laws. Indeed, unless the "necessary and proper" clause Article I, Section VIII, C1. 18 Constitution of United States granting general Congressional power was restricted by the Fourth Amendment, general unlimited government power to intrude into the privacy of individual citizens would be sanctioned.

The government and the Tenth Circuit Court of Appeals relied on 26 U.S.C. 6331(a) and (b) for the authority of the respondents to act in the fashion they acted in this case. The government has contended and the Court of Appeals accepted the position that the statutory process set out by Congress is sufficient to meet the Fourth Amendment standards.

Even assuming the Internal Revenue Service agents were intending to levy and not search, it is submitted that the executive authority to levy under Section 6331 does not contemplate the seizure of records not available to satisfy the tax assessment. Section 6331 (b) provides: "A levy shall extend only to property possessed and obligations existing at the time thereof." It would appear that only assets real, personal, tangible or intangible capable of satisfying the lien for taxes are the proper subject of levy. It is submitted the extensive seizure of records in this case was outside the statute. The Government's contention that it was merely seizing the records because the records may have concealed assets seems specious in view of Intelligence Agents' participation in the seizure and the copying of records and the subsequent transmission of some of them to the Federal Bureau of Investigation.

The proceedings in this case appear to have had some direction towards criminal investigation and possible prosecution since the seizure was conducted in part by agents of the Intelligence Division of the Internal Revenue Service and records taken in the seizure found their way into the hands of the FBI. As the trial court found, it is submitted that the conduct of the agents in this case cannot be said to be exclusively and in "good faith" directed towards a civil distress process. cf. *Donaldson v. United States*, 400 U.S. 517 (1971) requiring "good faith" on the part of Internal Revenue agents in the use of a civil summons. Also, *United States v. Weingarden*, 473 F.2d 454 (6th Cir. 1973).

It is submitted that especially where there is reasonable evidence to suggest that criminal investigation

was an allied purpose to the seizure of property of records that the Fourth Amendment should be applicable. The "sole purpose" test alluded to in *Donaldson v. United States, supra* is unworkable and inapplicable in the seizure area. It must be concluded that a seizure made in violation of a constitutionally reasonable expectation of privacy whether for tax purposes or otherwise is contrary to the Fourth Amendment. *Katz v. United States* 389 U.S. 347 (1967); *United States v. White*, 401 U.S. 745 (1971).

Even assuming that the seizure in the present case was solely a civil levy and seizure, it is submitted that Fourth Amendment safeguards apply. In addition the previously stated history surrounding the adoption of the Fourth Amendment, a synthesis of this Court's opinions would also reveal that the Fourth Amendment applies in purely civil proceedings as well as criminal proceedings.

In *Murray v. Hoboken Land Company*, 18 How. 272 (1855), this Court considered the question of whether a distress levy against a revenue collector issued by an executive official of the United States was a violation of the Fourth Amendment. The Court gave scant attention to the issue merely observing that the amendment had "no reference to civil proceedings for the recovery of debts of which a search warrant is not made part." p. 285. In light of the history of the Fourth Amendment, already discussed, it is questionable whether that conclusion was warranted. One of the concerns of the country's founders was the use of general warrants and writs of assistance in aid

of tax and customs collections. The conclusion in *Murray* fails to consider the history of the adoption of the Fourth Amendment. Furthermore, the *Murray* case has been substantially eroded by later decisions of this Court interpreting and applying the Fourth Amendment. In *Boyd v. United States*, 116 U.S. 616 (1886), the government sought to confiscate glass brought into the United States in violation of the custom laws. The case was, in effect, a revenue case. The prosecution did not seek a criminal penalty but only a civil confiscation and the forfeiture of the glass to the United States. The Court in combining the application of the Fourth and Fifth Amendments held that the defendants could not be compelled to produce an invoice of the transaction which would have supplied the needed government evidence to sustain the forfeiture. The Court ruled:

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; . . . (116 U.S. at 622).

The Court relied heavily on *Entick v. Carrington, supra*, which had recognized a civil cause of action for illegal seizure of private papers.

In *In re Jackson*, 96 U.S. 727 (1878), a habeas corpus action, the Court in a dictum statement said that the Fourth Amendment prohibited postal authorities from opening sealed letters in the mails except when

authorized by warrant. The case is significant in that the Court acknowledged the power of Congress to regulate and control the mails, but ruled that such power must be limited by the right of the citizenry to be free from unreasonable searches and seizures of private papers. Subsequent cases of this Court have applied the scope of the Fourth Amendment in such a way that it cannot be said to be restricted to criminal cases.

In *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), the unanimous court held the exclusionary rule enunciated by *Mapp v. Ohio*, 367 U.S. 643 (1961) applied to a forfeiture proceedings. The Court cited to *Boyd v. United States, supra*, noting that it was not a criminal case. The Court observed that in the particular forfeiture proceeding, the owner of the automobile had an interest in not losing his property and that the Fourth Amendment provided a protection for his property interest. The Court stated:

> It would be anomalous indeed, under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible.

Thereafter, in *Dyke v. Taylor Implement and Mfg. Inc.*, 391 U.S. 216 (1968), the Court applied the Fourth Amendment to a contempt proceeding associated with a labor dispute.

Courts of Appeal have applied the exclusionary

rule to non-criminal administrative hearings. ***Knoll Associates Inc. v. F.T.C.*** **397 F.2d 570 (7th Cir. 1968)** and the Tax Court has held the Fourth Amendment applicable in a civil tax proceeding. ***Efrian T. Suarez,*** **58 T.C. 792 (1972).** Similarly, in applying the Fifth Amendment, this Court has noted that civil tax proceedings often have corollary criminal ramifications. ***Mathis v. United States,*** **391 U.S. 1, (1968)** required ***Miranda*** warnings be given to a defendant who was serving a sentence in a Florida jail where a routine tax investigation was being conducted of a claim for tax refunds by the defendants.

Although in ***Wyman v. James,*** **400 U.S. 309 (1971)** this Court upheld welfare inspections conducted without a warrant to determine compliance with a state AFDC program, the Court noted that prior written notice was given of the home visit, forcible entry was not made, the welfare recipient had the right to refuse the visit, and that if the search were to become intrusive it could violate the Fourth Amendment. The procedures approved in ***Wyman*** were not observed in the Internal Revenue Service's seizure of petitioner's offices, assets and records. The ***Wyman*** case presents a situation wholly different than that presented in the instant case.

In Mr. Justice Brennan's concurring opinion in the recent case of ***Laing v. United States,*** **44 LW. 4035** at 4043, held that constitutional safeguards should apply in IRS seizures. That question was expressly reserved by the majority in ***Laing, supra*** at 4042, note 26 although the Court did cite to ***North Georgia Finishing,***

Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); *Mitchell v. W. T. Grant, Co.*, 416 U.S. 600, 610-611 (1974); and *Fuentes v. Shevin*, 407 U.S. 67, 72 (1972).

In the respondents' reply brief to the petition for certiorari it was contended that *Phillips v. Commissioner*, 283 U.S. 589 (1931) was sufficient precedent to support the actions of the revenue agents in the instant case. The dissenting opinion in the *Laing* case also relied on *Phillips*. The *Phillips* case did not consider the application of the Fourth Amendment to a levy and distraint procedure similar to that employed in this case. Notice was given to stockholders of the delinquent taxpayer corporation against whom collection was sought before any seizure was undertaken and a more formal procedure ensued. The seizure, if any, was not comparable to that of the instant case. The court simply indicated that the summary distraint process employed in that case was adequate compliance with Fifth Amendment due process of law. The court stated in that case the mere postponement of judicial inquiry was not a violation of due process of law under the procedures Congress had established. In Note 5, page 595 of 283 U.S., the court refers to the "ancient English practice of summary seizure of property of a Crown debtor. . ." However, it did not give consideration to the history of the Fourth Amendment which would suggest that the summary seizure of property from an area where there was a reasonable expectation of privacy without a probable cause determination or hearing was not to be sanctioned. Additionally, recent cases from this court have substantially undermined the broad pronouncements in *Phillips v. Commissioner, supra,*

Fuentes v Shevin, supra; Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra.* In *Fuentes v. Shevin, supra,* this Court acknowledged the *Phillips* decision but emphasized that its application approved in situations where it was "essential that governmental needs be immediately satisfied." 407 U.S. at 92. In *North Georgia Finishing, Inc.*, this Court held unconstitutional a Georgia process similar to the tax seizure process at 26 U.S.C. § 6331 when applied against a corporate bank account. In *Laing v. United States, supra,* this Court in a deficiency case under 26 U.S.C. § 6851 ruled that failure to comply with 26 U.S.C. § 6861(a) and (b) rendered the assessment and subsequent seizure of taxpayer's property under 26 U.S.C. § 6331(a) defective and allowed taxpayer injunctive relief. The Court noted the construction given to the Internal Revenue Code provisions rendered unnecessary the consideration of the continued viability of *Phillips v. Commissioner, supra.* 44 LW 4042 n. 26. While there are some distinctions between the IRS seizures in the *Phillips* case and in the present case, which would allow the court to decide in petitioner's favor without rejecting the rationale of *Phillips* but restricting it to its particular facts, the Court may wish to reexamine the holding of *Phillips* in light of its more recent decisions which are cited herein. Consequently it is submitted that the Fourth Amendment is applicable to a seizure proceeding of the nature found in this case whether the proceeding be denominated civil or criminal.

There is also no question that a corporation such as G. M. Leasing Corporation has the right to assert protections of the Fourth Amendment from having its corporate papers and properties seized contrary to law. *Silverthorne Lumber Co. v. United States*, 251 U.S. 358 (1920); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946): Irrespective of the government's alter-ego contentions, G. M. Leasing Corporation as registered owner and possessor had sufficient interest in the automobiles and records seized to give it standing to challenge the seizure, *Jones v. United States*, 362 U.S. 257 (1960); *Brown v. United States*, 411 U.S. 223 (1973); *Mancusi v. DeForte*, 392 U.S. 364 (1968).

In *Silverthorne v. United States, supra*, this Court acknowledged the Fourth Amendment protects a corporation from compulsory production of corporate books and papers and that when items have been obtained as a result of a previous unconstitutional search that they may not thereafter be used by the government for its benefit. In the *Silverthorne* case, a United States Marshal went to the office of the company and made a clean sweep of all books, papers and documents. Photographs and copies were thereafter made of the documents seized and then subpoenas issued to produce the originals. This Court speaking through Mr. Justice Holmes observed:

> The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."
>
> . . . In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. 232 U.S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

In this case, the action of the revenue agents in making such a broad and sweeping seizure of property that was claimed to be the corporate property of G. M. Leasing Corporation when the agents in fact were interested in property of George I. Norman, Jr. and his wife as much as that of G. M. Leasing Corporation amounts to a similar subterfuge. Substantial amounts of books and documents were seized and carried away in a moving van, scrutinized, copied, and disseminated to other government agencies. The actions of the government agents in the instant case are not dissimilar to those disapproved in the *Silverthorne Lumber* case.

In *Oklahoma Press Publishing Co. v. Walling, supra*, Justice Rutledge speaking for the Court stated that the Fourth Amendment:

> . . . guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is author-

> ized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. 327 U.S. at 208.

A subpoena couched in terms as broad as the seizure in the instant case would be beyond the scope of Fourth Amendment allowances. *Hale v. Henkel*, 201 U.S. 43 (1906); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946). *Schwimmer v. United States*, 232 F.2d 35 (9th Cir. 1957); 26 *Univ. So. Calif. Law Center Tax Institute*, 1022-23 (1974); Civil Versus Criminal Taxpayers Rights Under the Fourth and Fifth Amendments, 38 *Brooklyn L. Rev.* 130, 149-155 (1971). And a search warrant could not have justified the extent of the seizure of property and records without greater particularity. *Stanford v. Texas*, 379 U.S. 476 (1965); *Hill v. Phillpot*, 445 F.2d 144 (7th Cir. 1971), (evidence excluded obtained by in broad search warrant in tax investigation.) Indeed, it was conceded that the jeopardy assessment on which the seizure was attempted to be justified was itself in error. The scope of the seizure was similar to those condemned in *Kremen v. United States*, 353 U.S. 346 (1957) and *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931).

In *Gouled v. United States*, 225 U.S. 298 (1921) this Court disapproved the use of subterfuge to gain access to private papers to violate the Fourth Amendment. As pointed out before, the evidence in the instant case supports a conclusion that government agents attempted by subterfuge to rely upon an otherwise inapplicable process to gain access to property and rec-

ords for purposes of criminal investigation as well as just satisfying the revenue laws and that the seizures were conducted without a prior determination of probable cause, were made without a warrant and not under exigent circumstances, and were without any reasonable limits.

POINT II

IN THE ABSENCE OF EXIGENT CIRCUMSTANCES THE FOURTH AMENDMENT REQUIRES A WARRANT PRIOR TO THE SEIZURE OF PROPERTY OR EVIDENCE BY INTERNAL REVENUE SERVICE AGENTS.

This Court has on many occasions indicated that a search not predicated on a search warrant is per se unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maroney*, 399 U.S. 42 (1970). *Katz v. United States*, 389 U.S. 347 (1967). Since the Fourth Amendment expressly refers to seizures as well as searches it can be assumed that a seizure not based on a warrant is per se unreasonable unless there are exigent circumstances that dissipate the need for a warrant. Adequate alternative process that affords an equivalent protection may also suffice to dispense with a warrant in special situations not present in this case. Cf. 26 U.S.C. § 6213; 26 U.S.C. § 2401.[1] In the in-

[1] Petitioner will not attempt to assess the constitutionality of alternative processes that Congress may have provided in tax deficiency cases since such alternatives were not employed in this instance.

stant case the government agents purported to rely upon the provisions of 26 U.S.C. § 6331 (a) and (b) to support their action. It is submitted that these provisions cannot justify the action that respondents took against petitioner in this case.

In some instances it may be that in tax seizure matters that circumstances are so compelling that immediate action is necessary to prevent the destruction or removal of property, and in such cases careful articulation of facts justifying action and excusing the Fourth Amendment warrant requirements may sustain a seizure. *Warden v. Hayden*, 387 U.S. 294 (1967); *Carroll v. United States*, 267 U.S. 132 (1925); *Husty v. United States*, 282 U.S. 694 (1931).

No exigent circumstances have been established in the instant case.

It has been noted by this Court the levy and distraint provisions under the Internal Revenue laws dispensing with notice and opportunity to be heard before seizure arises out of necessity in enforcement of the tax laws, *Phillips v. Commissioner, supra; Laing v. United States, supra.* Petitioner claims that blanket provisions cannot control all cases and that each case must be judged on its own facts as to whether or not exigent circumstances exist so that seizure without notice for determination of probable cause may occur. Petitioner contends that absent a showing of exigent circumstances making necessary the immediate seizure of property that a seizure warrant must be obtained. *Coolidge v. New Hampshire, supra; Vale v. Louisiana*, 399 U.S. 30 (1970).

This Court has held it a prerequisite to the search or seizure of property that a warrant issue upon the judgment of a neutral and detached magistrate finding probable cause for the seizure or search and specifying with particularity the items to be seized. *Coolidge v. New Hampshire, supra.* In the instant case, there was no control, as a practical matter, on the judgment of the agents as to whether or not to seize or what assets were to be seized. The vehicles seized in the instant case were claimed by petitioner and intervenor to be the property of G. M. Leasing Corporation. The respondents seized the vehicles contending they were the property of George I. Norman, Jr. and his wife. The determination as to whether there was probable cause for such a belief and thus to seize the vehicles should have been made, by a magistrate rather than the judgment of government agents engaged in the competitive enforcement of the tax and criminal laws of the United States. *Katz v. United States, supra; Johnson v. United States*, 333 U.S. 10 (1948).

The facts of the instant case show a radical departure from the notion of a neutral detached magistrate's decision. The first step leading to the seizure was an assessment. In the instant case, no "thirty day letter" or notice of any kind was given to taxpayer prior to the assessment (although George I. Norman, Jr. was a fugitive, his wife who was also assessed, was present and Mr. Norman had left behind him not only his assets but also a power of attorney).

This first step, the assessment, was prepared by defendant Phillip Clayton. (App. 25). Clayton, an In-

ternal Revenue agent had audited Norman for four previous years. (App. 26). There was question as to the manner in which Mr. Clayton had handled the previous years' audits and there was also evidence of Clayton's malice or at least disparagement of Norman in his prior audits. (R. Vol. I, pages 36-38).

The assessment Mr. Clayton prepared was admittedly erroneous. Among other things, he failed to give Norman credit for a $290,000 payment which he knew Norman had paid; (App. 26-27), he prepared penalties and interest as if no payment had been made; he included items in income which he admitted on the witness stand were not income; (App. 27), he gave no credit for expenses but admitted that he knew that Norman had extraordinarily high business expenses. (App. 26). The Government attorney at the trial stipulated that the assessment was erroneous. From that initial basis, the erroneous assessment, the seizure originated.

Thereafter, the Internal Revenue Service, not a neutral detached magistrate, determined that the collection of taxes for both Mr. and Mrs. Norman was in jeopardy. Again, Phillip Clayton recommended the decision. (App. 26).

The final step for seizure was the determination that petitioner G. M. Leasing Corporation was the alter ego, nominee or transferee of George I. Norman, Jr. Again, no independent detached determination.

Phillip Clayton himself participated in the seizure raid along with the 13 other agents seven of which were intelligence officers, (App. 27). Phillip Clayton, a

Revenue officer, had never previously participated in a seizure nor was such activity part of his job description (App. 28). Clayton testified that his sole purpose for participating was to seize books and records. (App. 29). The evidence was replete and the trial court found that agent Clayton acted with malice. (R. Vol. II, page 86, para. 10). Respondent Clayton initiated the entire process that resulted in seizure of petitioner's property. The facts of this case demonstrate the need for a neutral detached determination prior to seizure.

Equally as important is that there be some specificity particularizing the things to be seized. The Fourth Amendment requirement of particularity was clearly violated in this case. The seizure in this case included boxes full of records and numerous motor vehicles without there being any prior probable cause determination that the items were properly subject to seizure in aid of the distraint process of the revenue laws or probable cause to seize the items for purposes of criminal investigation. Congress has expressly provided for a warrant process in tax matters. 26 U.S.C. § 7302; 26 U.S.C. § 7608. Consequently, the emergency distraint laws absent a warrant, as employed in this case, can only be harmonious with the Fourth Amendment where they are interpreted as applying under exigent circumstances and not sanctioning what, in effect, is a writ of assistance or general warrant.

This Court has previously required the application of the warrant process and some form of probable cause standard in less intrusive situations. *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967);

See v. City of Seattle, 387 U.S. 541 (1967). The *Camara* case recognized that "prompt inspection even without warrant" may occur in instances "that the law has traditionally upheld in emergency situations." 387 U.S. 539. The facts of the instant case show no emergency situation that would justify dispensing with a warrant. The assessment was made by the government on March 19, 1973, weeks after Norman became a fugitive. Not until days later did government agents move to the premises where the records and vehicles were seized. At that time, respondents had arranged to have various agents present and to employ private locksmiths to remove locks. They left the premises on March 21, 1973, replacing the locks but returned on the 23rd day of March, 1973, without a warrant to continue the seizure and arranged for a van to remove items seized. The taxpayer had not been present for a period of weeks. The books and papers were seized but not examined and photocopied for some period of time after their seizure. C.f. *Coolidge v. New Hampshire, supra.* Under these circumstances, there was ample time to obtain a warrant for the seizure or search of items properly sought. The right of the government to seize property and records in enforcement of the tax laws must be balanced against the Fourth Amendment privacy interests which a citizen, corporate or individual, has a constitutional right to expect. To allow such seizure is to substantially reduce the efficacy of the Fourth Amendment as well as to reverse the common law traditions that restricted the seizure of private papers. *Entick v. Carrington, supra*; Cf. *Stanford Daily v. Zurcher*, 353 F.Supp. 124 (N.D. Cal. 1972). In *Frank*

v. Maryland, 359 U.S. 360 (1959) a case the ultimate holding of which has been effectively undermined by *Camara v. Municipal Court of San Francisco, supra,* Justice Frankfurter noted the following with reference to the history of the Fourth Amendment:

> [T]wo protections emerge from the broad constitutional proscription of official invasion. The first of these is the right to be secure from intrusion into personal privacy, the right to shut the door on officials of the state unless their entry is under proper authority of law. The second, and intimately related protection is self-protection; the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual, information which may be used to effect a further deprivation of life or liberty or property . . . . [*H*]*istory makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought.* 359 U.S. 365 (Emphasis supplied).

The observation of Justice Frankfurter on the Fourth Amendment application to forfeiture is still valid.

Even if exigent circumstances existed in the instant case which would dispense with the requirement of obtaining a warrant and determination of probable cause by a neutral and detached magistrate, due process would demand that some sort of a hearing be given before the Internal Revenue Service would be allowed to retain the property seized. See e.g., and *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601 (1975);

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Such was the gist of Mr. Justice Brennan's concurring opinion in the recent *Laing v. United States*, 44 LW 4035, 4043. Although 26 U.S. 7426, would allow an alleged alter ego such as G. M. Leasing Corporation to file suite in District Court for return of seized property such is not expeditious or adequate enough to satisfy due process standards.

As constitutional safeguards apply to IRS seizures, the provisions of the Fourth Amendment requiring the issuance of a warrant based upon an independent, neutral, and detached determination of probable cause should be a prerequisite. If, because of exigent circumstances of the particular case, the requirements of a warrant should be dispensed with, then due process demands that immediately subsequent to the seizure a hearing be afforded to determine the right of taxpayers and persons in positions similar to G. M. Leasing Corporation.

POINT III

BECAUSE OF THE WRONGFUL SEIZURE ACTION OF THE RESPONDENTS THE TRIAL COURT PROPERLY FOUND LIABILITY FOR DAMAGES AND AWARDED AFFIRMATIVE RELIEF.

The action against the individual defendants was predicated in part by this Court's decision in *Bevin v. Six Unknown Named Agents*, 403 U.S. 388 (1971) where this Court held that even though Congress had not provided a tort remedy for violation of Fourth

Amendment rights that a complaint alleging a Fourth Amendment violation by federal agents acting under color of their authority would give rights to a federal cause of action for damages. This action is not to be confused with petitioner's claim for wrongful levy under 26 U.S.C. § 2426. The latter cause of action is against the United States for return of seized assets not belonging to the delinquent taxpayer. The former cause of action is against the individual agents who participated in the search of petitioner's office and intervenor's residence and seizure of books and records. The trial court found that petitioner should have recovery against the respondents for damages for their respective violations. The amount is yet to be determined. It is submitted that an analysis of the evidence shows a blatant insensitivity to the constitutional rights of G. M. Leasing Corporation and to the obvious damage of G. M. Leasing Corporation. On remand of *Bevins* (2nd Cir. Court of Appeals 456 F.2d 1439) the Court ruled that a defense of good faith would be available to the defendants in that case who may have violated Fourth Amendment rights of a person. The court applied a standard similar to that applied by this Court in *Pearson v. Ray*, 386 U.S. 547 (1967) in interpreting 42 U.S.C. § 1983. In the instant action, the respondents did not specifically plead good faith in their answer or counterclaim. (R. Vol. 2 p. 65), but relied more on sovereign immunity and the legality of their actions. The trial court, however, found in favor of the petitioner. The evidence amply justifies that finding. The respondents did not make an effort to obtain a search warrant or to proceed by subpoena even though ade-

quate time to obtain such a warrant existed. The assessments were admittedly and knowingly erroneous. Agents arranged to forcefully remove the locks at petitioner's office and entered to seize items. They returned a second time again without a warrant, and proceeded to seize the property and records of the petitioner in an indiscriminate fashion. The records were later photostated and some transmitted to the FBI. When George I. Norman, III, the intervenor in the action below, protested that the property was that of G. M. Leasing Corporation, he was threatened with imprisonment and that his mother's home and his family's property would be seized. The search was conducted not by agents concerned with revenue alone, but also by agents of the Intelligence Division thus clearly indicating an intent to seize evidence for criminal investigation. The agents were aware on March 21, 1973, that there were constitutional problems associated with their actions, but later decided to disregard their own intuition. Under these circumstances, the Court's determination that judgment should be awarded in favor of petitioner and against respondents is reasonably supported by the evidence.

Additionally, the trial court was within its prerogative of awarding petitioner affirmative relief. Such relief is not barred by 26 U.S.C. § 7421(a). The relief is properly in aid of the vindication of petitioner's Fourth Amendment rights and therefore, not subject to the above statutory restraint that might otherwise be applicable. *Laing v. United States, supra.* Compare *Bob Jones University v. Simon,* 416 U.S. 725 (1974) and *Alexander v. American United, Inc.*, 416 U.S. 752

(1974). Also so much of the relief as seeks return of the seized property from the United States is expressly exempted from 26 U.S.C. § 7421(a) and sanctioned by 26 U.S.C. § 7426(a).

This Court has recognized that the government may not benefit by using evidence obtained, *Silverthorne Lumber v. United States, supra,* nor evidence derived from illegal activity. *Wong Sun v. United States,* 371 U.S. 471 (1963); *Nardone v. United States,* 308 U.S. 338 (1939). It is indeed more difficult in the event of a criminal prosecution for a defendant to determine whether evidence illegally obtained resulted in additional evidence being obtained. This is especially so in the case of matters involving records and the complexities of a possible tax prosecution. In the event of criminal prosecution of G. M. Leasing Corporation, it might be very difficult to ascertain if the government derived any benefit from its illegal actions in conducting the instant seizures. Affirmative injunctive relief granting the return of evidence and prohibiting its use would seem to be in harmony with other actions of this Court and decisions of the Courts of Appeals granting affirmative relief against police misconduct. *Allee v. Medrano,* 416 U.S. 802 (1973); *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966); *Gomez v. Layton,* 394 F. 2d 764 (D.C. Cir. 1968). Injunctive relief is equally necessary and harmonious with this Court's holding in *Bevins v. Six Unknown Named Agents, supra,* as damages were in that particular situation. Plaintiff also relied on Rule 41(e) of the Federal Rules of Criminal Procedure in seeking return of the property illegally seized.

The property illegally seized should be returned, damages allowed, yet to be proved against the individual respondents, and the government precluded from exploiting the evidence seized. The government should not thereafter be allowed to proceed to seize the property again without meeting Fourth Amendment standards.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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